Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278 CC Docket No. 92-90
	)	
In the Matter of	)	
	)	
CONSUMER BANKERS ASSOCIATION Consumer Bankers Association Petition for Expedited Declaratory Ruling with Respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code.	)	CG Docket No. 02-278 DA No. 04-3835
	)	
In the Matter of	)	
	)	
ALLIANCE CONTACT SERVICES, *et al.*	)	CG Docket No. 02-278 DA No. 05-1346
Joint Petition for Declaratory Ruling That The FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)	

STATE OF INDIANA'S REPLY COMMENTS IN OPPOSITION TO ALLIANCE CONTACT SERVICES, *et al.'s* JOINT PETITION FOR DECLARATORY RULING AND IN OPPOSITION TO THE CONSUMER BANKERS ASSOCIATION'S PETITION TO DECLARE INDIANA'S TELEPHONE PRIVACY LAW PREEMPTED

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SUBMISSION OF COMMENTS

Subject to and without waiving either its motions to dismiss or its immunity from suit in this federal forum, the State of Indiana, by its Attorney General, respectfully submits these reply comments in opposition to Alliance Contact Services, *et al.'s* Joint Petition For Declaratory Ruling, filed April 29, 2005, and in opposition to the Consumer Bankers Association's Petition to Declare Indiana's Telephone Privacy Law Preempted, filed November 19, 2004.

INTRODUCTORY STATEMENT

Telemarketers are so desperate for minimum access to every household in America regardless of consumer preferences, yet so bereft of valid legal and policy arguments in favor of federal preemption, that they now resort to *ad hominem* attacks and Orwellian newspeak in hopes of finding sympathetic ears on the Commission. Thus, in the view of TCI, the Attorney General of Indiana, the state's elected chief legal officer, has engaged in public discourse on this matter that is nothing less than "fraudulent." (TCI Comments Filed July 29, 2005 at 8) And the Interstate Sellers and Teleservices Providers, as well as Venetian Resort Casinos, LLC, now insist that do-not-call laws are not "consumer protection" laws at all (Interstate Sellers and Teleservices Providers Comments Filed July 29, 2005 at 11; Venetian Comments Filed July 29, 2005 at 10-11), in defiance of the name given the Act that supplies the Commission's own authority in this area. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227 *et seq.*).

One telemarketer even says that "[i]t is hard to believe that [Indiana] consumers would be so passionate about denial of the instant petitions if they had accurate information." (TCI Comments at 9) The telemarketers clearly have not even the faintest idea about the dramatically favorable impact Indiana's do-not-call law has had on the lives of ordinary Hoosiers. It is an inescapable fact that registered telephone subscribers in Indiana will be exposed to far more telephone harassment in the event an EBR exemption is foisted upon them through some sort of preemptive decree. The petitions asking for a declaration of state preemption *do* threaten consumers' privacy, telemarketers most assuredly *do* wish to call people notwithstanding the fact that they have signed up for the Indiana do-not-call list, and the success of those petitions would indeed "allow telemarketers to avoid state regulation merely by calling from outside the state." (*Id.* at 8)

There is no justification, as a matter of law or policy, for preempting states and guaranteeing telemarketers a minimum level of access to all households. When it comes to residential privacy, one size does not fit all, and do-not-call programs can—and ought—to allow individual households to decide which they value more: privacy or commercial and charitable solicitations delivered by telephone. Indiana's citizens value privacy more highly, perhaps, than the nation's citizens as a whole, given that Indiana's do-not-call program provides no exemption for sales calls in the context of existing business relationships. The telemarketers' position is that they, with the aid of the Commission, should be allowed to disregard those legitimate preferences because respecting them would be too hard or would actually be contrary to consumers' enlightened self interests.

Indiana's position, in contrast, is that consumers are capable of deciding for themselves whether it is better to have more privacy or to be bombarded with yet more pitches for souped-up telephone services, low-introductory-interest credit cards and the like. And Indiana has provided actual concrete evidence that compliance with multiple telephone privacy laws can be achieved for pennies a call. At least to date, the telemarketers have provided no evidence to support their self-serving statements that multi-state compliance imposes commerce-stifling burdens.

Underlying these policy issues is the question whether the Commission even has the power to preempt Indiana and other states. On this score the telemarketers offer nothing new—just the same discredited theory that do-not-call laws are essentially telephone service regulations. Some even think that it matters for purposes of the preemptive effect of the Federal Communications Act of 1934 whether a telemarketing pitch is sincere or fraudulent. This line of reasoning is nonsensical, and the Commission should conclude that no federal enactment either preempts state do-not-call laws from applying to interstate calls or authorizes the Commission to declare such preemption.

ARGUMENT

I. Preemption Would Open A Massive Gap In the Web of Privacy Protection Enjoyed By Indiana Citizens For the Past Three Years

In its earlier comments, Indiana has made the stakes in this matter quite clear. For Indiana citizens, federal preemption of Indiana's more restrictive law would mean substantially less residential privacy than those citizens have enjoyed under Indiana's do-not-call law over the past three-and-a-half years. The reason for this is that the Commission's do-not-call rule, as required by the TCPA, permits telemarketing calls to those who have registered for the do-not-call list when there is a prior business relationship with the consumer (or even just a product inquiry by the consumer) sometime within the preceding eighteen months. 47 C.F.R. § 64.1200(f)(3); 47 U.S.C. § 227(a)(3). Indiana allows no such exemption, though its law does permit businesses to call registered telephone subscribers with whom the business has an outstanding contract (but only concerning fulfillment of the contract, not to pitch new transactions). Ind. Code § 24-4.7-4-4.

Consumers interact with potential telemarketers in all kinds of ways every day. They use MBNA's and Discover's credit cards, they use telephone companies' services, and they purchase an infinite variety of products and services from an infinite number of companies that may undertake telemarketing campaigns. And considering that not just these companies with whom consumers have direct contact or transactions, but also their affiliates, may call consumers for a period of eighteen months renewable with each days' transactions, Indiana's citizens can hardly expect anything other than a comparative deluge of telemarketing calls if their current privacy protections are preempted.

Yet the telemarketers insist that Indiana's registered telephone subscribers will be well enough protected even if they are forced to swallow the federal EBR exemption. They call the Indiana Attorney General's statements to the contrary "misinformation" and "fraudulent." (CBA Comments in Support of Joint Petition Filed July 29, 2005 at 4; TCI Comments at 8) Not only are these characterizations intemperate and unsupported, but they also reflect cognitive dissonance. Why are the telemarketers investing such effort and expense to overturn Indiana's law? Because they know that if they succeed the federal EBR exemption would permit them to bother nearly every registered telephone subscriber in Indiana on a daily basis. The level of disturbance that Indiana's citizens would suffer is in direct proportion to the benefit telemarketers would expect to realize from imposition of the EBR exemption in Indiana.

The fact that Indiana's law would still provide protection against intrastate calls is hardly comforting. Commenters such as Indianapolis-based NPS LLC, which provides C-band programming services, can call Hoosiers just as easily from another state as from Indiana.

CBA suggests that its consumers will have sufficient protection from EBR-exempt calls because they can ask not to be called. (CBA Comments in Support of Its Petitions Filed July 29, 2005 at 5-6) Yet the entire reason that centralized do-not-call lists are necessary is because the company-specific lists that the FCC and FTC required before did not work. Report and Order, 18 F.C.C. Rcd. 14014, 14017, ¶ 2 (2003) There is no reason to expect such lists to work now, particularly in light of the range and number of transactions and inquiries consumers conduct on a daily basis, and there is no reason to shift the privacy burden back to the consumer simply for buying a product. It is not reasonable to assume that consumers who have bothered to register for the Indiana do-not-call list expect to sacrifice the protections they have elected to receive just because they have used a credit card or asked about DSL service.

The Commission cannot take seriously CBA's unsupported, counterintuitive pronouncement that "consumers often expect calls in response to inquiries that do not include a specific request that a call be made." (CBA Comments in Support of Its Petition at 6) At the very least, consumers who have registered for Indiana's do-not-call list do not expect such calls. Ultimately, Indiana's citizens know something that the telemarketers' chosen profession does not permit them to understand, let alone accept: that no means no.

II. The FCC Does Not Have Exclusive Jurisdiction Over Interstate Telemarketing Or the Power to Preempt More Restrictive State Telemarketing Laws, Particularly Not With Respect to EBR Calls

While the ACS Coalition has focused its preemption argument on the impact of Sections 1 and 2 of the Federal Communications Act of 1934 (FCA), most others in the telemarketing industry have focused on the TCPA. Neither enactment, however, bestows the Commission with exclusive jurisdiction over interstate telemarketing or the ability to preempt states from enforcing more restrictive telemarketing laws against interstate callers.

A. The original provisions of the FCA do not address telemarketing.

As explained in detail in Indiana's initial comments in response to the ACS Coalition's petition, Sections 1 and 2 of the FCA deal only with regulation of common carriers and the services and facilities of interstate telecommunication. (Indiana's Comments in Opposition to Joint Petition Filed July 29, 2005 at 7-9) Those provisions say nothing about regulating those who *use* interstate telecommunication services. The text of the FCA quite clearly addresses only regulation of the "instrumentalities, facilities, apparatus, and services" involved in interstate telephone transmissions. 47 U.S.C. § 153 (52). This is consistent with the original purpose of the FCA, which was enacted "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151.

Regulation of interstate telemarketing, however, in no way advances or hinders this purpose. Whether MBNA, for example, may make interstate telephone sales pitches to registered telephone subscribers who happen to use its cards every day has no bearing on whether the market for long distance yields cheap and efficient services. And the notion that the FCA provides the Commission with exclusive jurisdiction over MBNA's harassment of its customers simply because MBNA uses the telephone is contradicted by the past seventy years of state consumer protection enforcement (Attorneys General Comments Filed July 29, 2005 at 3-5) and by the FTC's regulation of telemarketing calls. Telemarketing Sales Rule, 16 C.F.R. pt. 310.

The notion, advanced by the ACS Coalition and other commenters, that the FCA somehow permits state laws against fraudulent interstate calls but not state laws against honest but unwanted calls, has no basis in statutory text or history, or common sense for that matter.

Either states can protect consumers from abusive interstate telemarketing calls or they cannot. Whether the caller tells the truth during the call cannot plausibly impact whether regulatory jurisdiction exists. As noted in the Introduction, *supra*, even Congress understands that telemarketing regulations are *consumer protection* regulations. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991).

B. The TCPA does not mandate or permit preemption of any state laws.

With respect to the TCPA, there is no text that preempts state telemarketing regulations as applied to interstate laws. Nor is there any grant of authority to the Commission to declare such preemption in the TCPA. Quite the contrary: The TCPA plainly states that more restrictive state laws that prohibit the making of telephone solicitations shall not be preempted, regardless whether such prohibitions apply to interstate calls. 47 U.S.C. § 227 (e)(1)(D). Whether the TCPA allows preemption of state laws that merely regulate (rather than prohibit outright) interstate telephone solicitations (such as mandatory disclosure and automatic dialer regulations) may be another issue, and is certainly of less concern to Indiana. The focus of Indiana's attention is on its law that prohibits telephone sales calls to registered telephone subscribers, regardless of where those calls originate, and regardless of a prior business or personal relationship. The TCPA plainly forbids federal preemption of such state laws as enforced against interstate telephone calls.

The telemarketers argue that "it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." (BellSouth Comments Filed July 29, 2005 at 4) (citing *Report and Orde*r, 18 F.C.C. Rcd. at 14064, ¶ 83) In its Report and Order, however, the Commission cites only to the statement of one Senator for the proposition that Congress intended to promote a uniform scheme. *Report and Order*, 18 F.C.C. Rcd. 14014, 14064 n.268, ¶ 83 (2003) (remarks of Sen. Pressler) ("The Federal Government needs to act now on uniform legislation to protect consumers."). Furthermore, as Indiana has detailed in its earlier comments, other provisions of the TCPA and later enactments show that Congress anticipated that states would continue to enforce their own laws even after promulgation of a federal rule. (*Id.* at 18-19)

If Congress truly wanted a uniform national scheme, it would have focused on expressly preempting state laws rather than on expressly not preempting them. In fact, earlier unenacted versions of the TCPA included language that would have specifically preempted any state laws concerning interstate communications that conflicted with the TCPA. (Indiana's Comments in Opposition to Joint Petition at 17-18) That Congress did not adopt that version of the TCPA speaks volumes about its lack of preemptive intentions.

Charter Communications' argument that more restrictive state do-not-call laws interfere with the regulatory goals of the Telecommunications Act of 1996 is also unavailing. (Charter Communications Comments Filed July 29, 2005 at 7) The Telecommunications Act of 1996 is "[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56 (1996). The Telecommunications Act of 1996, like the Federal Communications Act of 1934 that it amends, is thus about providing telephone services, and not about protecting consumers from harassing or fraudulent telephone calls. (*See* Indiana's Reply Comments in Opposition to the Consumer Bankers Association's Petition Filed February 17, 2005 at 3-4; *see also* Indiana's Comments in Opposition to Joint Petition at 10) The fact that the Commission has acted to limit inappropriate regulation of broadband service to achieve the goal of the 1996 Telecommunications Act (*see* Charter Comments at 7) is not relevant to do-not-call laws.

There is also no basis for the Consumer Bankers Association's assertion that, because Indiana and Wisconsin's do-not-call rules are more stringent than federal requirements, those laws are "inconsistent, conflicting obligations" that must be preempted. (CBA Comments in Support of Its Petitions at 8) Being restricted by one law from doing what another law would permit in no way amounts to "inconsistent, conflicting obligations." It is not as if federal law *requires* the CBA's members to make calls that the Indiana law *prohibits*. CBA's members are perfectly capable of complying with both the federal and Indiana laws, so there is no basis for preemption based on supposedly conflicting duties under the law.

C. The FCC has no jurisdiction over existing business relationship calls, so it may neither forbid them nor protect them from states regulation.

Pursuant to the TCPA, the FCC's power to regulate telemarketing calls extends only to "telephone solicitations" as defined therein. 47 U.S.C. § 227(c) (1). Yet, as the CBA points out at page 3 of its comments in support of its own petition for declaratory ruling, the TCPA's definition of "telephone solicitations" *excludes* calls "to any person with whom the caller has an established business relationship." 47 U.S.C. § 227(a) (3). In other words, a call to a consumer with whom the caller has an existing business relationship is not a "telephone solicitation" under the TCPA and therefore may not be regulated by the Commission.

This means, however, that the Commission also has no power to protect EBR calls from *state* regulation. Any preemption by the Commission could only be through the exercise of its power under the TCPA, and with respect to do-not-call rules, that means as bestowed by 47 U.S.C. § 227(c) (1). Because that power expressly does not include the power to regulate EBR calls, EBR calls may not be protected by the Commission's preemptive authority, such as it may otherwise be. Like calls on behalf of non-profits (see Part IV, *infra*), EBR calls simply lie outside the Commission's jurisdiction. So, even if the Commission may otherwise preempt state do-not-call laws (and it may not), it is statutorily forbidden to do anything of the sort concerning EBR calls, regardless of where they originate.

III. The Record Shows That Compliance With State Laws Is Easy And Cheap

Many telemarketers argue that, without preemption, compliance burdens will be overwhelming. They construct an elaborate, yet unsupported, vision of compliance problems that are complicated, chaotic, confusing, and costly. But even on their face, such doomsday scenarios fail to inspire concern.

The CBA, for example, worries that its members cannot call Indiana residents with whom they have a federally recognized EBR without checking Indiana's do-not-call list (CBA Comments in Support of Its Petitions at 9), but it does not explain why this is particularly difficult or even marginally more burdensome than other telemarketing compliance measures that must be undertaken anyway. CBA also seems to think it would be hard for one of its member banks to avoid calling an Indiana registered telephone subscriber who requested a call from an affiliate of the bank. (*Id.*) Yet CBA never explains why the member bank, rather than the affiliate, would be prompted to call that subscriber based on the inquiry of the affiliate. CBA frets about whether its members' employees will understand that they cannot call customers who register for the do-not-call list, and it explains the need for a supposedly complicated decision chart, but then implicitly concedes that the chart will be needed for FCC rule compliance anyway. (*Id.* at 12) And then in another startling concession, the CBA says its members will eschew complicated compliance programs and "simply will decline to call customers on the

Indiana and Wisconsin do-not-call lists, even where those customers have an EBR with those institutions of the kind recognized by federal law." (*Id.* at 12) It is refreshing to see the CBA acknowledge that compliance is a "simpl[e]" matter.

And, indeed, the reality is that multi-state compliance is easy and cheap. Indiana has detailed in its Comments in Opposition to the Alliance Contact Services Joint Petition for Declaratory Ruling and its Supplemental Comments in Opposition to the Consumer Bankers Association's Petition for Declaratory Ruling just one example of a service, called Teleblock®, that is inexpensive and effective in ensuring that telemarketers comply with all state laws. With services such as Teleblock® that provide automatic blocking of restricted numbers, companies should no longer have to monitor each state's laws, their own campaigns, or the actions of their vendors because the service already does that for them at very little cost. (Indiana's Comments in Opposition to Alliance Contact Services Joint Petition Appendix at 2-3) Teleblock® has yet to see one of its customers fined, and Indiana's enforcement experience indicates that telemarketers calling across state lines currently have no compliance difficulties.

BellSouth's comments concerning the supposed costs and inefficiencies of the current system also warrant particular attention. BellSouth attempts to explain how permitting states to impose more stringent regulations on interstate calls supposedly harms consumers by causing them to miss commercial opportunities. (BellSouth Comments at 2) BellSouth explains how it had planned to launch a marketing campaign to promote an "aggressive DSL offer," but dropped the campaign after researching state telemarketing laws. (*Id.*) BellSouth admits that it was able to use other avenues to promote its DSL offer and accepts that not all consumers welcome telemarketing offers, but worries that some consumers missed this opportunity because of the extensive state laws. (*Id.*)

BellSouth misses the point: Consumers who have registered for the protection of do-not-call laws *do not want to be called*. Without doubting that BellSouth's concern for consumers' access to its DSL services arises from only the most sincere spirit of altruism, it is not too much to say that registered telephone subscribers have already decided that they do not want their privacy invaded or to be subjected to "aggressive DSL offers" over the telephone. Consumers who value their privacy over telephonic commercial bombardment should not be made to suffer just because BellSouth thinks it has a really great deal for them.

Nor, contrary to the insinuations of the Coalition of Non-Profit Organizations, are consumers in any way confused. In fact, thousands of Hoosiers who have expressed to the Commission their objections to any form of preemption understand very well the difference between Indiana's laws and the FCC's rules, and they prefer the more expansive protections they get in Indiana. What would be confusing to Indiana's citizens is an FCC ruling that deprives them of the residential privacy to which they have become accustomed over the past three years. Indiana citizens may be unique in the respect that the FCC program means less protection, not more. But that is no reason to pull the rug out from under them. Rather, if anything, the Commission should make a special effort not to preempt Indiana's more stringent do-not-call rules, even if it preempts other rules in other states.

IV. The FCC Has No Jurisdiction Concerning Nonprofits

As noted, a coalition of Non-Profit Organizations has submitted comments supporting preemption. (Coalition of Non-Profit Organizations Comments Filed July 29, 2005 at 1) TCI's comments also imply that preemption would help non-profits since they are not regulated by the FCC's do-not-call rule. (TCI Comments at 9, 11) As Indiana explained in its earlier comments, however, only the FTC, and not the FCC, has jurisdiction over telemarketing by non-profits.

(Indiana's Comments in Opposition to Joint Petition at 21) Furthermore, the FTC has expressly decided against preempting state do-not-call laws. Therefore, any preemption that the FCC might declare in this matter would not affect Indiana's ability to enforce its laws against interstate telephone sales calls by or on behalf of non-profits.

The Coalition of Non-Profit Organizations and TCI also urge preemption in this regard because, in their view, applying telemarketing restrictions against non-profits violates the First Amendment. (Coalition of Non-Profit Organizations Comments at 3; TCI Comments at 9) The Coalition even suggests that do-not-call laws are a prior restraint on speech. (Coalition of Non-Profit Organizations Comments at 3) Yet these commenters do not take issue with the constitutionality of in-house do-not-call lists, and even advocate them as an acceptable alternative to centralized lists. (TCI Comments at 8-9) These telemarketers do not explain how being forbidden to call people on a list that they are required keep is any different under the First Amendment than being forbidden to call people on a list that the government keeps.

Do-not-call laws do not invest public officials with wide-ranging discretion and so are not prior restraints (*see Hill v. Colorado,* 530 U.S. 703, 733-35 (2000)), and they do not violate the First Amendment when applied to charities any more than when applied to commercial entities. In both cases the government may give effect to consumers' express preferences that they not be called, just as the government can give effect to consumers' no-solicitation signs. *See Martin v. City of Struthers,* 319 U.S. 141, 148 (1943). And in both cases the government is engaged in regulation because of the deleterious secondary effects of unwanted speech (*i.e.* the invasion of privacy), not because it disagrees with any messages being conveyed. *See Mainstream Mktg. Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1237 (10^{th} Cir. 2004). *Riley v. National Federation of the Blind,* 487 U.S. 781 (1988), cited by the Coalition of Non-Profit

Organizations, invalidated content-based restrictions imposed on charities directly by the government (though it did not characterize them as "prior restraints" as the Coalition suggests). *Riley* did not address content-neutral rules giving effect to individual consumer preferences. If the Commission is going to preempt states, it should not do so based on trumped-up First Amendment concerns.

CONCLUSION

For the foregoing reasons, the Commission should deny the ACS Coalition's Joint Petition For Declaratory Ruling and rule that states are in no way preempted from enforcing do-not-call or other telemarketing laws where offending telephone calls cross state lines. The Commission should also reject the Consumer Bankers Association's Petition to Declare Indiana's Telephone Privacy Law Preempted and expressly declare that the Commission's do-not-call rule and registry do not preempt any similar state laws or registries.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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